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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF THE PARENT-CHILD)
RELATIONSHIP OF E.R., MINOR CHILD,)
AND HER FATHER, BARTON ROBINSON)

BARTON ROBINSON,)
)
Appellant-Respondent,)

vs.)

MARION COUNTY DEPARTMENT)
OF CHILD SERVICES,)

Appellee-Petitioner,)

and)

CHILD ADVOCATES, INC.,)

Appellee-Guardian Ad Litem,)

No. 49A02-0604-JV-339

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Deborah J. Shook, Master Commissioner
Cause No. 49D09-0501-JT-2777

November 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Barton Robinson (“Father”) appeals the trial court’s order terminating his parental rights as to his daughter, E.R. We affirm.

Issues

We restate Father’s issues as follows:

- I. Whether his constitutional right to due process was violated; and
- II. Whether the trial court’s order terminating his parental rights was clearly erroneous.

Facts and Procedural History

E.R. was born to Father and Latoya Smith (“Mother”) on January 7, 2003. Father, who has never been married to Mother, signed a birth certificate shortly after E.R.’s birth in Oklahoma City, Oklahoma. His paternity was never established before the trial court, however. On May 7, 2004, the Marion County Department of Child Services (“DCS”) received a report that Mother had left E.R. at her aunt’s home with no provisions and no contact information, as she had apparently done on many prior occasions, and that the aunt suspected that Mother was using drugs. DCS removed E.R. from the aunt’s home and placed her in foster care.

At this time, Father lived with Mother and E.R. and worked as a truck driver and mechanic. DCS failed to notify Father prior to removing E.R. from her aunt's home. He did not find out that DCS had placed E.R. in foster care until the next day. On May 10, 2004, DCS filed a petition alleging that E.R. was a child in need of services ("CHINS"). On July 20, 2004, the trial court held a disposition hearing and found sufficient evidence to support the CHINS petition. The court ordered Father to adhere to the terms of a participation decree, which included making weekly contact with a caseworker, securing and maintaining a legal and stable source of income and suitable housing, completing a home-based counseling program with E.R., completing a parenting assessment and a drug and alcohol assessment, submitting to random drug testing, visiting E.R. on a regular basis, and reimbursing DCS forty dollars per week for placement and services. *See* Petitioner's Exh. 4. Father was present at two or more of the CHINS hearings. Father participated in supervised visits with E.R. There is no explanation in the record as to why these visits were discontinued in August 2004.

In October 2004, Father was arrested. One month later, he was convicted for dealing in cocaine as a class B felony. Since his conviction on November 4, 2004, Father has been incarcerated. His scheduled release date is September 9, 2008.

On January 26, 2005, DCS filed petitions for involuntary termination of the parent-child relationship as to both Mother and Father. At the initial hearing on this petition, held on March 18, 2005, Father appeared and requested appointment of counsel. The court appointed a public defender to represent Father and ordered that E.R. remain in foster care. On May 3, 2005, Father appeared at the continued initial hearing and entered a denial to the

petition. Immediately prior to the trial on March 17, 2006, Mother signed a consent for termination of her parental rights. At trial, the court heard evidence, including Father's testimony, as to the petition to terminate Father's rights. On April 5, 2006, the trial court ordered termination of Father's parental rights as to E.R. Father now appeals.

Discussion and Decision

I. Due Process

Father contends that he was not given an opportunity to be heard prior to the termination hearing and that the trial court thus violated his constitutional right to due process. He contends that he did not understand the nature of the CHINS proceedings, that the trial court failed to appoint an attorney to represent him until the termination petition was filed, and that he did not understand the documents that he signed throughout the proceedings.

The Fourteenth Amendment to the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. When the State seeks to terminate a person's parental rights, it must do so in a manner that meets the requirements of due process. *In re C.C.*, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *trans. denied*. The nature of the process due in a termination proceeding turns on the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. *Id.*

In the past, we have noted that a person's right to raise his or her child is an essential, basic right more precious than property rights. *See In re Paternity of M.G.S.*, 756 N.E.2d

990, 1004 (Ind. Ct. App. 2001), *trans. denied* (2002). Therefore, a parent's interest in the accuracy and justice of the termination decision is "commanding." *J.T. v. Marion County Office of Family & Children*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000), *trans. denied*. We also recognize the State's significant *parens patriae* interest in protecting a child's welfare, however. *Id.* As for the risk of error created by the challenged procedure, Father claims that he was not permitted to meaningfully participate in the CHINS proceedings because no one explained the purpose of the proceedings and because he was not provided counsel. The record indicates that upon Father's request, the trial court promptly appointed counsel for him. He now claims that he had requested an attorney at some point during the CHINS proceedings, though he cannot recall at which hearing or how the court ruled. There is simply no evidence in the record to support his claim of an earlier request for counsel.

As for his failure to understand the purpose of the documents he signed, his testimony on this issue is telling:

Father's Counsel: So some of the documents that you were asked about, you weren't – you didn't understand what they were because an attorney hadn't explained to you at the time you received them?

Father: That's true. In fact, there was one that you had – I signed with you that I didn't have the full understanding of until after I had researched it. You have to understand, I don't know about this law stuff. I have to research this stuff. If I sign something, I go back and research it and I found out that I shouldn't have signed it or I wouldn't abide to the fullest, the good side or the bad side of what I signed, then I'm in the dark. I expect attorneys to tell me what to sign and what not to sign.

Tr. at 24-25.

Father essentially admitted in this testimony that he knowingly and voluntarily signed legal documents regarding his daughter's future even though he was uncertain as to the

meaning of these documents. He was present in court during the CHINS proceedings and had the opportunity to request counsel and/or to express his confusion to the trial court. There is no evidence, other than his own self-serving testimony, that he did either. Furthermore, he was called to testify at the termination hearing. At that time, he told the trial court about his desire to retain parental rights as to E.R., the nature of his relationship with her, his past financial support of her, his explanation for not completing the DCS programs, and other information relevant to this case. In light of the fact that Father did not even have a constitutional right to be present at the termination hearing, we think that the risk of error in this termination proceeding was minimal. *See J.T.*, 740 N.E.2d at 1264 (holding that incarcerated parent does not have an absolute right to be physically present at termination proceeding).

In sum, Father was present for at least two CHINS proceedings, was afforded the opportunity to participate in DCS programs to reach the goal of reunification initially set by DCS and the trial court, and was transported from jail and permitted to testify at the termination hearing. His due process rights were not violated.

II. Sufficiency of the Evidence

Father also claims that the trial court erred in terminating his parental rights. Our standard of review is well settled.

When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. Rather, we will consider only the evidence and reasonable inferences therefrom which are most favorable to the judgment. Where the trial court has entered findings of fact, as it did here, we engage in a two-tiered standard of review. First, we determine whether the evidence supports the findings. Next, we determine whether the findings support the judgment. We will set aside the trial court's

findings and judgment only if they are clearly erroneous. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made.

In re J.W., 779 N.E.2d 954, 959 (Ind. Ct. App. 2002) (citations omitted), *trans. denied*.

It was DCS's burden to prove the following by clear and convincing evidence:

(A) one (1) of the following exists:

(i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

....

(B) there is a reasonable probability that:

(i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2).

Here, Father challenges the trial court's findings that there is a reasonable probability that the conditions leading to E.R.'s removal will not be remedied and that there is a reasonable probability that the continuation of the parent-child relationship between Father and E.R. poses a safety threat to the child. *See Appellant's App.* at 13. In fact, the statute indicates that DCS is required to prove only one of these two elements. We need only address the first here.

To determine whether there is a reasonable probability that the conditions leading to the child's placement outside the home will not be remedied, the trial court should judge a parent's fitness at the time of the termination hearing and take into consideration any evidence of changed conditions. *In re C.C.*, 788 N.E.2d at 854. The court must also evaluate

the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. *In re J.W.*, 779 N.E.2d at 960. The court may also properly consider the parent's response to services offered by the State. *In re C.C.*, 788 N.E.2d at 854.

DCS presented sufficient evidence of a reasonable probability that the conditions leading to E.R.'s removal will not be remedied. Mother had left E.R. with the child's aunt on multiple occasions, and the aunt suspected that Mother was using drugs. Father claimed that he was unaware of E.R.'s whereabouts on the day her aunt called DCS and E.R. was taken into custody. When Father returned home at approximately 5:30 a.m. the next day, he noticed that Mother and E.R. were not at home, but he took a shower and went to sleep, as was his normal routine.¹ Father was notified later that day about DCS's placement of his daughter in foster care. Over the course of the next few months, he attended at least two CHINS hearings and at least one supervised visit with E.R. He failed, however, to complete most of the requirements set forth in the participation decree issued by the trial court in July 2004.² In fact, only a few months after E.R. was placed in foster care, Father was arrested for selling drugs. He is now serving time in prison for the conviction stemming from this arrest.

¹ When asked if he was worried about them, he responded, "Sure I was worried about them but what could I do at that time?" Tr. at 17.

² Father claims that the trial court and/or DCS failed to notify him of the requirements set forth in the parental participation decree. The DCS caseworker testified that the DCS file contained copies of numerous letters sent to Father regarding the requirements for reunification. Father obviously received notice of the CHINS hearings, as he appeared at some of them, and he was informed of the visitation schedule as well as the discontinuation of supervised visits. Therefore, it appears that he was within the trial court's and/or DCS's chain of communication.

Father compares his case to a recent decision by another panel of this Court in *In re R.J.*, 829 N.E.2d 1032 (Ind. Ct. App. 2005). In that case, the father appealed the trial court's termination of his parental rights. The trial court found that the father had made threats to burn down the visitation site and to shoot a drug screener. Also, he had tested positive for marijuana use in the past, and one social worker who had worked on the case suggested that he was "paranoid," although she admitted that she did not have training to medically diagnose him as such. *Id.* at 1037. Also, the child was doing well in a foster care placement, which was likely to lead to adoption. We reversed the trial court's termination order, citing many reasons for our decision, including the following: there was "zero evidence" supporting the trial court's finding of father's alleged threats of violence, all but one of his random drug screens yielded negative results, his psychological examination did not result in a diagnosis of mental illness, and there was no evidence that he had failed to cooperate with DCS in completing the programs recommended to him. *Id.* at 1037-38. In the instant case, Father states that our conclusion in *R.J.*, summarized below, should apply here as well:

Parental rights cannot and should not be terminated on the *potential* for harm or because some hypothetical circumstance may come true. These types of speculative situations exist in many different environments, but are not basis for the termination of parental rights. We realize a child's safety and well-being is in the balance. However, we must apply the law as it exists, and in this case [DCS] has not carried its burden.

Id. at 1039 (emphasis in original).

Clearly, the trial court in the instant case relied upon much more than speculation and hypothetical circumstance in rendering its decision to terminate Father's rights. Here, the

evidence supports the trial court's findings that Father did not establish paternity,³ that he did not complete the programs offered by DCS, and that he was arrested for selling illegal drugs several months after his daughter's removal and was convicted a month later. He is incarcerated and claims that he will begin a work release program in July 2007, although his official release date is September 9, 2008. He admits that even if he is released next year, he will be unable to provide a home for E.R. until he becomes "established enough," though he has not indicated when that might be. Tr. at 28.

In sum, there are facts and inferences therefrom which support the trial court's determination that there is a reasonable probability that the circumstances leading to E.R.'s removal will not be remedied. This finding, along with the others not contested by Father, support the trial court's decision to terminate Father's rights as to E.R. Therefore, the trial court's judgment is not clearly erroneous. In essence, Father's argument is a request for us to reweigh the evidence, which we cannot do.

Affirmed.

BAKER, J., and VAIDIK, J., concur.

³ Apparently, Mother told DCS that Father was not E.R.'s biological father. Father claims that he signed E.R.'s birth certificate, but there is no evidence that a birth certificate was ever provided to DCS or to the trial court.